

Sun Petroleum Products Company, a Division of Sun Oil Company of Pennsylvania and Hugh McKinney and International Brotherhood of Electrical Workers, Local Union No. 278. Cases 23-CA-7227, 23-CA-7453, 23-CA-7611, and 23-CA-7453-2

July 31, 1981

DECISION AND ORDER

On July 17, 1980, Administrative Law Judge William J. Pannier III issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief. Respondent filed cross-exceptions and a brief opposing the General Counsel's exceptions and in support of the Administrative Law Judge's Decision.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,¹ findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

We agree with the Administrative Law Judge's finding that Respondent did not contravene Hugh McKinney's *Weingarten*² rights by suspending him for refusing to attend an interview. However, we disagree with his rationale for this finding.

The Administrative Law Judge properly found that prior to March 19, 1979,³ Respondent decided to suspend McKinney for refusing to follow Foreman McKenzie's direction to work overtime on March 16. At work on March 19, McKenzie directed McKinney to report to Maintenance Manager Johnson's office. It was unclear whether McKinney was told the purpose of the meeting. However, it is undisputed that McKinney phoned Johnson from the shop area and that Johnson said that the meeting concerned the incident on Friday, March 16. McKinney refused to report to Johnson's office unless he was accompanied by a witness, although he did report to the area outside Johnson's office without a witness. When Respondent refused to permit him to have a witness, he ran from the area outside Johnson's office back to the plant floor with Respondent's officials pursuing him. Arriving on the plant floor, McKinney called two employees to witness the incident. Respond-

ent's officials sought to have McKinney leave the plant. McKinney refused to do so unless he could speak with Refinery Manager Laird. Following a heated exchange during which it became clear to McKinney that Laird was not going to meet with him, McKinney left the plant. Before he left he was told he was being suspended indefinitely.

Later that day Respondent assembled a panel of supervisory personnel to investigate the McKinney case. The panel interviewed those employees (other than McKinney) who had knowledge of or who were directly involved in the March 16 overtime incident. The investigation confirmed the facts on which Respondent based its earlier decision to suspend McKinney.

Subsequently, on March 23, Human Resources Manager Fleming, by letter, invited McKinney to attend a meeting scheduled for March 28, at which the parties would "review the facts and circumstances leading to [McKinney's] indefinite suspension." He was advised that he could choose a fellow employee to accompany him to the meeting if he wished. The letter also stated that the sole purpose of the March 19 meeting had been to inform McKinney of his suspension, not "to conduct a disciplinary interview," and he would not be suspended for having refused to attend the March 19 meeting. McKinney refused to attend the March 28 meeting because Fleming told him that he could not bring a representative of the Union, instead of an employee, to the meeting.⁴ On March 29, Respondent, by letter of that date, discharged McKinney.⁵

The consolidated complaint alleges, *inter alia*, that Respondent suspended Hugh McKinney in violation of the National Labor Relations Act, as amended, because he refused on March 19 to attend a meeting which he reasonably believed would result in discipline, after Respondent refused his request to have a representative accompany him. The Administrative Law Judge observed that the Supreme Court in *N.L.R.B. v. J. Weingarten, Inc.*,⁶ held that an employee has a Section 7 right to a representative at an interview where he reasonably fears that disciplinary action will be taken

¹ The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

³ All dates are in 1979 unless otherwise indicated.

⁴ At the time of the hearing, Respondent's employees were not represented by a union, although the Oil, Chemical and Atomic Workers, and the International Brotherhood of Electrical Workers, Local Union No. 278, had attempted unsuccessfully to represent Respondent's employees.

The Regional Director for Region 23 dismissed two representation petitions filed by the IBEW in June 1978. At the time of the hearing in the instant case, no representation petitions had been filed since the dismissal of those two petitions.

⁵ The Administrative Law Judge found, and we agree for the reasons stated by him, that McKinney's discharge was not discriminatorily motivated as contended by the General Counsel. There was no contention that McKinney was unlawfully discharged for his failure to attend the March 28 meeting.

⁶ *Supra* at fn. 2.

against him. The Administrative Law Judge concluded, however, that under the principles established in *Baton Rouge Water Works Company*, 246 NLRB 995 (1979), no *Weingarten* right existed in the instant case. In *Baton Rouge*, the Board held there is no statutory right to representation at an interview called by the employer when the purpose of the interview is simply to inform the employee of, or impose, previously determined discipline. Here, the Administrative Law Judge reasoned that, because McKinney's discipline had already been decided upon, the interview, had it occurred on March 19, would have merely served the purpose of informing him of the decision. Accordingly, he found that no *Weingarten* right arose in connection with the scheduled interview.⁷ We disagree.

McKinney was approached by his foreman, McKenzie, on the next workday following his refusal to comply with McKenzie's order to work overtime, and was told by McKenzie to report to Maintenance Manager Johnson's office. McKinney telephoned Johnson and was told by Johnson that the meeting concerned the incident on Friday. No other information was given McKinney about the meeting. McKinney then refused to attend the interview unless he was accompanied by a witness. At this point, we find that McKinney had reason to believe that disciplinary action could be taken against him, and that, under *Weingarten*, he had a statutory right to representation at the interview. In this regard, Respondent's request that McKinney report to a meeting is the classic situation contemplated by *Weingarten*.

Respondent, however, refused McKinney's request to have a witness present and McKinney refused to attend the interview and ran back to the shop area. Confronted with McKinney's refusal and his running back into the shop, Respondent's representative followed McKinney and attempted to persuade him to leave the refinery.⁸ Thereafter, on the same day, Respondent conducted an independent investigation of the McKinney case.

⁷ The Administrative Law Judge also relied on *Roadway Express, Inc.*, 246 NLRB 1127 (1979), to find the *Weingarten* doctrine inapplicable to the instant case. *Roadway Express* held that an employee may request union representation while on the plant floor, but he may not refuse to report to the office as directed, and undermine the employer's right to maintain discipline and order.

The Administrative Law Judge found that, by first refusing to leave the shop area and by then refusing to go any farther than the office immediately outside Johnson's office, McKinney forfeited his *Weingarten* rights as did the employee in *Roadway Express*. We disagree. While McKinney refused to go into Johnson's office, he did follow Respondent's directive to leave the shop area, and he reported to the office adjoining Johnson's. Thus, unlike the situation in *Roadway Express*, McKinney did not attempt to compel Respondent to conduct its business in the shop area or undermine its right to maintain order in its operations.

⁸ There is no contention, nor do we find, that the exchange between McKinney and Respondent's official constituted an interview, or that this exchange played any role in McKinney's suspension or discharge.

Respondent's actions concerning its refusal to conduct an interview with McKinney in the presence of a witness of his choice were consistent with the rights of an employer as discussed by the Court in *Weingarten*. The Court stated:

The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that might be derived from one. [*Id.* at 258.]

Accordingly, we find no violation of the Act inasmuch as no interview occurred on March 19. Thus, we find that *Baton Rouge* does not apply. Although Respondent made a prior decision to suspend McKinney, no interview took place and we are therefore led to speculate as to what might have happened had the interview been conducted. In these circumstances we cannot say that the scheduled interview, like that which was conducted in *Baton Rouge*, would not have given rise to the statutory right to representation.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaints be, and they hereby are, dismissed in their entirety, and that the settlement agreement in Case 23-CA-7227 be, and it hereby is, reinstated.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge: This matter was heard by me in Corpus Christi, Texas, on December 18, 1979, and on January 22 and 23, 1980. On July 12, 1979, the Regional Director for Region 23 of the National Labor Relations Board issued an order consolidating cases, consolidated complaint and notice of hearing—based upon unfair labor practice charges filed in Case 23-CA-7453, by Hugh McKinney, on March 23, 1979, and in Case 23-CA-7453-2, by International Brotherhood of Electrical Workers, Local Union No. 278, herein called the Union, on March 28, 1979—alleging that Sun Petroleum Products Company, a Division of Sun Oil Company of Pennsylvania, herein called Respondent, had violated Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C., §151, *et seq.*, herein called the Act, by indefinitely suspending McKinney on March 19, 1979, because, after requesting the presence of a witness or representative, McKinney

had refused to attend an interview that he had reasonable cause to believe would result in disciplinary action. On November 14, 1979, the said Regional Director issued an order setting aside settlement agreement and withdrawing approval of a settlement agreement in Case 23-CA-7227, filed on September 1, 1978, by McKinney. Also on November 14, 1979, the said Regional Director issued an order consolidating cases, consolidated complaint and notice of hearing, based upon the charge in Case 23-CA-7227 and upon a charge in Case 23-CA-7611, filed on July 17, 1979, by McKinney, alleging that Respondent had violated Section 8(a)(3) and (1) of the Act by terminating McKinney on March 29, 1979,¹ and had violated Section 8(a)(1) of the Act by unlawfully interrogating employees, by promising better working conditions to employees if they would forgo union activities, by creating the impression of surveillance of employees' union activities, by accusing an employee of creating "dissension" among other employees, and by directing various threats against employees because of their union or protected activities. At the hearing, the General Counsel amended the consolidated complaints by adding the allegation that Respondent had requested that employees receiving subpoenas from the General Counsel produce those subpoenas and had told those employees that copies of the subpoenas were being made for their personnel files.²

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based upon the entire record, upon the briefs filed on behalf of the parties, and upon my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent has been a Pennsylvania corporation, with an office and place of business in Corpus Christi, Texas, where it engages in the refining of hydrocarbons. During the 12-month periods prior to issuance of each of the consolidated complaints, which are acknowledged to have been representative periods, Respondent sold and shipped products, goods, and materials valued in excess of \$50,000 directly from its Corpus Christi, Texas, facility to points outside the State of Texas. Therefore, I find that, at all times material, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

¹ In his brief, counsel for the General Counsel states that McKinney's suspension of March 16, 1979, was also alleged to be a violation of Sec. 8(a)(3) and (1) of the Act in the consolidated complaint issued on November 14, 1979. However, examination of that consolidated complaint discloses that, while the discharge was specified as a violation, no mention was made of the suspension.

² In making his motion to amend with respect to this allegation, the transcript shows that the General Counsel's representative stated "affidavit," rather than "subpoena." While no motion to correct the transcript in this respect has been filed, it is nonetheless obvious from the context in which the motion to amend was made that the transcript should read "subpoena."

II. THE LABOR ORGANIZATION INVOLVED

At all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Oil, Chemical and Atomic Workers, herein OCAW, commenced an organizing campaign, seeking to represent certain employees employed by Respondent at its Corpus Christi refinery. In February or March 1978,³ at the request of certain employees who were dissatisfied with the progress of OCAW's campaign, the Union, which had been representing certain other employees at the refinery since 1973,⁴ commenced a campaign to organize the employees that OCAW had been attempting to organize. On April 20, the Union filed two representation petitions, one seeking an election among employees in the pump shop, including pump mechanics, and the other seeking an election among employees in the instrument shop, including instrument mechanics. On May 17, a representation hearing was held to receive evidence pertaining to the appropriateness of the units covered by the two petitions and, on June 16, the Regional Director for Region 23 issued a Decision and Order, dismissing both petitions based upon the fact that the units sought were too narrow to be appropriate. Thereafter, according to McKinney and Union Business Manager Rick Diegel, a joint organizing campaign has been conducted by the Union and OCAW. Apparently, however, it has not been a particularly viable one, for there is no evidence that any further representation petitions have been filed during the year and a half between dismissal of the petitions filed by the Union and the commencement of the hearing in the instant matter.

It is undisputed that during 1978 certain remarks had been made to employees by Supervisor Ralph James⁵ which the General Counsel alleges to have been unlawful. Thus, in mid-February, during a conversation with B Class pump mechanic Edward Y. Gillespie, James had said that he had been hearing the names of Lonnie Lewis, Arthur Kloth, and Gillespie "quite a bit in this union organization out here," and did not want to hear Gillespie's "name mentioned with this union any more." In March or April, James asked A Class mechanic Glenn Farris if he had any union cards and, after Farris had denied possessing any, had asked if Farris intended to go to the Union's meeting that night. Farris said that he did plan to attend the meeting. Initially, James encouraged him to do so. However, a few minutes later, James asked Farris to accompany him on a truck ride to the tank farm. While en route, James mentioned that rheumatoid arthritis, such as Farris had, could make it difficult for an employee working in the field and that Farris might be considered to replace Howard Green, who worked in an

³ All dates in this portion of this Decision occurred in 1978 unless otherwise stated.

⁴ No evidence was presented concerning the scope of the units represented by the Union.

⁵ During 1978, James, who had supervised the entire shop, had been a supervisor within the meaning of Sec. 2(11) of the Act. By the time of the hearing, he had retired. He did not appear as a witness, although Respondent did not assert that he had been unavailable.

air-conditioned sealed room, once Green retired. Then, James referred to the union meetings and organizing, and said that unions were all right in the construction industry, but that they merely caused dissension in refineries and, in any event, that Respondent's employees had good working conditions.

James had been on vacation when the representation hearing had been conducted. When he returned, he told mechanic Ernie Davenport that "all this union stuff" had created a mess at the plant and that he had heard that Davenport had attended the hearing.⁶ James inquired if Davenport thought that the other employees were going to like him for having attended. When Davenport replied that he really did not care if they did so, James retorted "that he damn sure didn't like me for it."

On a Wednesday in August, the Union and OCAW conducted a meeting on the side of the road, near Respondent's facility.⁷ McKinney was involved in organizing the employees who attended and, on the following day, was absent from work. This led James to comment, to some of the employees, that McKinney had probably gotten drunk at the Union's meeting and, as a consequence, had been unable to report for work that day.⁸ When McKinney finally did report for work the following week, he learned of James' remark and broached James regarding it. Initially, James denied having made such a statement. As the conversation progressed, it became quite heated. McKinney accused James of being a liar and summoned Gillespie, who confirmed that James had said that McKinney had probably missed work because he had gotten drunk at the Union's meeting. James began to taunt McKinney, referring to him as "Baby Huey."⁹ As the confrontation progressed, Manager of Facilities R. L. Hoerner¹⁰ joined the group, but he did not intervene. McKinney testified that at one point James had said, "If you don't change your ways you are going to be a permanent B Class if you don't get run off first." However, though he continued to maintain that James had made the remark about getting "run off," McKinney conceded that in a pretrial affidavit, given within a month of this conversation, he had stated only that "Ralph James then told me that if I didn't change my ways I would be a B Class pump mechanic from now on." Similarly, Gillespie testified that James had said only that "Hugh's attitude was bad and that if he didn't change it he would probably remain a B Class from now on out there." Davenport testified that James had said "that if Hugh didn't change his attitude he

wouldn't have to worry about any advancement or anything else at Sun Oil Company."

In addition to James, the General Counsel also alleges that, on one occasion in 1978, Hoerner also had made unlawful statements. During the representation hearing, Diegel had made a telephone call to Respondent's refinery and had requested that Davenport locate a witness for the Union to call to rebut certain testimony given by Respondent's officials. McKinney volunteered and he asked John Paul Makush¹¹ if he could leave to go to the courthouse on legal business. After speaking with Hoerner, Makush said that McKinney could do so. Davenport also asked if he could leave to attend to legal business at the courthouse.¹² In the process of granting that request, Makush inquired when the Union had moved its office to the courthouse. Davenport and McKinney attended the hearing, but only the latter was called by the Union as a witness.

On the following morning, they were summoned to a meeting with Makush, Hoerner, and Manager of Maintenance Jerry Dan Johnson.¹³ At that meeting, Hoerner questioned their truthfulness because they had merely asked to be excused from work the prior day to attend to legal business, without having specifically said that they intended to go to the hearing. Hoerner said that the hearing had not been a legal proceeding but that, in any event, Respondent's supervisors had been instructed to release any of the employees whose presence had been requested there. He asked how the two employees had come to attend the hearing, whether they had been subpoenaed or had been requested by name. McKinney testified that Hoerner had also inquired whether the Union had paid the two employees to attend the hearing. Davenport testified that Hoerner had said that the two employees would not be paid for attending the hearing. During the course of the meeting, Johnson asked whether the two employees had heard anyone lie while testifying at the hearing and McKinney retorted that Respondent's witnesses should have received Oscars for their performances. As the meeting progressed, it became more heated and repetitive, but when the two employees attempted to leave at one point, Johnson instructed them to remain until excused, pointing out that it was Respondent who signed their paychecks.

The foregoing conduct was encompassed by the investigation of the charge in Case 23-CA-7227. On September 29, 1978, the Regional Director for Region 23 approved a settlement agreement, encompassing the unfair labor practices disclosed during that investigation. There is no allegation that Respondent thereafter violated the Act until March 19, 1979,¹⁴ when McKinney was sus-

⁶ As discussed more fully *infra*, Davenport had accompanied McKinney when the Union had requested the latter to appear at the hearing as a witness for the Union.

⁷ Diegel and Davenport testified that the purpose for having the meeting at that location had been so that everybody would know that it was taking place and to encourage employees to attend.

⁸ McKinney denied that beer had been served at the meeting. However, Davenport and Gillespie both testified that they had consumed beer during the course of this particular meeting and Diegel testified that he had provided beer and soft drinks at these meetings whenever he had the time and the money.

⁹ McKinney testified that James would refer to him as "Baby Huey" on those occasions when James would attempt to upset him.

¹⁰ It is undisputed that during 1978 Hoerner had been a supervisor within the meaning of Sec. 2(11) of the Act.

¹¹ Makush is a Class A mechanic who acts as relief foreman when needed. There is no contention that he has been a supervisor within the meaning of Sec. 2(11) of the Act.

¹² Both McKinney and Davenport testified that they had not specifically mentioned that they intended to attend the representation hearing because they felt that, had they done so, they would not have been permitted to leave work early.

¹³ Between January 1978 and April 1979, Johnson had been a supervisor within the meaning of Sec. 2(11) of the Act.

¹⁴ Unless otherwise stated, all dates hereafter occurred in 1979.

pended. The pertinent events preceding that suspension are largely undisputed.

On Friday, March 16, McKinney had been scheduled to work until 4 p.m., his normal quitting time, with Class A mechanic Arthur Kloth.¹⁵ At approximately 3 p.m., Mechanical Foreman William Edward McKenzie, Jr.,¹⁶ instructed the two employees that they would have to work overtime to complete repairs on the Udex area GA-1407-2R glycol pump.¹⁷ McKinney replied that he could not do so, adding that he had a doctor's appointment.¹⁸ At least one employee, Farris, volunteered to work in McKinney's stead. While there is some dispute as to whether McKenzie had agreed to permit Farris to do so,¹⁹ it is undisputed that McKenzie initially did agree to permit McKinney to leave at 4 p.m. if a replacement worker could be secured.

McKenzie then²⁰ told McKinney that in the future he should advise Respondent either the evenings prior to or the mornings of days when he would have to leave at the normal quitting time.²¹ McKinney admitted that he had retorted that "I considered what I had going on outside of working hours was private and personal." McKenzie, angered at this response, then withdrew permission for McKinney to leave at 4 p.m. Nevertheless, McKinney said he intended to leave at 4 p.m.²² McKenzie then stalked off after, according to McKinney, again saying, "You are not going anywhere." Kloth, who had been listening to the exchange, then told McKinney that

¹⁵ There is no contention that Kloth had been a supervisor within the meaning of Sec. 2(11) of the Act.

¹⁶ It is agreed that, at all times material through April, McKenzie had been a supervisor within the meaning of Sec. 2(11) of the Act.

¹⁷ McKenzie testified that the unit foreman had reported that the pump had to be completed before the weekend, when the maintenance employees are not scheduled to work, so that, in effect, should the pump then in use malfunction, there would be a replacement pump available, thereby avoiding the need to shut down the unit and to call back personnel for weekend repair work.

¹⁸ While Farris claimed that McKinney had said only that "he had to see the doctor that evening," and although Kloth testified that McKinney had said only that he had to "go to the doctor," McKinney conceded that, as McKenzie testified, he had said that he had a doctor's appointment. Due to McKinney's medical history, Respondent's officials were aware that he had been receiving treatment from Chiropractor Blackwood. In addition, Respondent's manager of human resources, Robert Fleming, whose family had also been receiving treatment from Blackwood, was aware that Blackwood followed a practice of not accepting appointments.

¹⁹ McKenzie testified that when Farris had volunteered to work as McKinney's replacement, he (McKenzie) had replied, "No, Glenn. You are drawing Class 'A' pay and we need a helper." McKinney and Farris both testified that McKenzie had said that it was all right for Farris to replace McKinney if Respondent could not locate a helper or Class B mechanic to serve as his replacement. Kloth testified that McKenzie had never answered when Farris had volunteered and, further, he testified that he could not even be certain that McKenzie had heard Farris volunteer.

²⁰ McKinney and Farris each testified that McKenzie had left the area and then had returned, at which point he had asked McKinney to provide advance warning when he had to leave early. Neither Kloth nor McKenzie made any reference to such a hiatus in the conversation that afternoon.

²¹ McKenzie testified that it had been a "courtesy" for employees to provide such notification. He further testified that McKinney had been the only employee who had not observed this "courtesy" in the past. There is no evidence that such prior notification had been a requirement.

²² While McKinney claimed that he had been in great pain that day, it is undisputed that McKinney never had said as much to McKenzie nor to any other supervisor.

he could leave at 4 p.m. if he could not stand the pain from his back. At 4 p.m., McKinney clocked out and left for Dr. Blackwood's office. However, neither Kloth nor McKinney reported to McKenzie, nor to any other supervisor, that Kloth had excused McKinney at normal quitting time.

After telling McKinney to remain, McKenzie had gone to Johnson's office where he had reported what had occurred. Johnson, who testified that he had never encountered a prior instance where an employee had directly refused to perform work, contacted Hoerner who, in turn, had contacted Fleming. The three of them—Fleming, Hoerner, and Johnson—then met and, in light of the novelty of the situation, reviewed Respondent's policy book, to ascertain what, if any, rules would be broken should McKinney leave at 4 p.m., as he claimed that he would do. Subsequently, when McKenzie ascertained that McKinney had punched out at 4 p.m. and when he reported that fact to his three superiors, the latter decided to suspend McKinney indefinitely. By way of explanation for this decision, Fleming testified:

We had an incident reported by a supervisor that as I knew the circumstances that Friday, it appeared to me to be gross insubordination. However, we had only the supervisor, supervisor's side of what happened, and at that—at that time, if it proved true, I guess I felt like it was a dischargeable offense. However, I felt like it needed to be looked into and to get all the people that were involved in the situation together and find out the facts.

Johnson testified that on Friday night, he had prepared a draft of the suspension letter which was to be given to McKinney. Inasmuch as Johnson's and Fleming's Saturday commitments did not permit them to meet to review the draft together, Johnson left it at the refinery guard shack, where, during the course of the day, both McKenzie and Fleming reviewed it.²³ On Saturday evening, during a telephone conversation, Fleming notified Johnson that the draft was satisfactory. Both Johnson and maintenance assistant Darlene Cook Pyles, Johnson's secretary, testified that Johnson had called her on Saturday evening and had directed her to pick up the draft at the guard shack and to type it in final form so that it would be ready first thing on Monday morning. She testified that she had done so on Sunday. The letter identified as being the one that she had typed was produced at the hearing. It opens by stating that "[i]n confirmation of your indefinite suspension . . .," continues by reciting the three specific rules that had been violated by McKinney's departure on Friday evening, then states that the violation of these rules on March 16 by McKinney "constitutes a serious act of insubordination," an-

²³ While the descriptions of the draft provided by Respondent's witnesses largely corresponded, McKenzie testified that the draft had not contained matters relating to the heading (such as date, from, to, and subject), while Pyles testified that these items had been written on the draft. I do not regard such a discrepancy as material. See, e.g., *N.L.R.B. v. International Longshoremen's & Warehousemen's Union, Local 10, et al.* [Pacific Maritime Association], 283 F.2d 558, 562-563 (9th Cir. 1960).

nounces that "the suspension will remain in effect until further investigation is completed" and concludes by informing McKinney that he could challenge Respondent's actions through the grievance and arbitration procedure in Respondent's working policies booklet. Johnson testified that it had been his intention to meet with McKinney on Monday, to advise him of the suspension and to give him the letter. He further testified that he "had no intention of discussing with him what he did the previous Friday. I was going to leave it up to whoever investigated what happened."

After work had commenced on Monday, March 19, McKenzie directed McKinney to report to Johnson's office.²⁴ McKinney refused to do so unless he was accompanied by a witness, although he was willing to report to Pyles' office, just outside that of Johnson. Respondent refused to permit McKinney to have a witness, relying upon Fleming's reading of the February 8 Commerce Clearing House Labor Law Guide which reported a court case involving the right of employees to have witnesses during interviews with management. When it became clear to McKinney that he was not going to be permitted to be accompanied by a witness during the meeting with Johnson, he bolted from Pyles' office, returning to the shop with Respondent's officials in pursuit. When he arrived in the shop, McKinney called Farris and Davenport to come over to witness what was occurring. Respondent's officials directed McKinney to leave the facility and he refused to do so without first having the opportunity to speak with Refinery Manager J. L. "Doc" Laird. A somewhat lengthy interchange of comments and actions then took place as each side tried to impress its desires upon the other. Finally, when it became clear to McKinney that Laird was not going to meet with him, he left the refinery.

McKinney, corroborated by Farris and Davenport, testified that, during the course of these events, Johnson had said that McKinney was being suspended for not attending the meeting in the office, although it is undisputed that McKenzie had interjected that the suspension was also for what had happened on Friday. In the final analysis, Johnson did not deny having said that the suspension was for refusing to attend the March 19 meeting. Seemingly, he was unable to recall exactly what had been said regarding that subject, although he did recall having told McKinney to leave the plant because he was being insubordinate.

After McKinney had left the facility, Respondent assembled the employees to, in Johnson's words, "explain to them what had happened, what all the commotion and all was about." At this meeting, certain comments are attributed to Respondent's officials which, if credited, would tend to undermine its defense that the decision to discharge McKinney had not been made until later and,

further, had not been made on the basis of considerations relating to McKinney's union support and activities. With respect to the latter point, alone of the five witnesses called by the General Counsel, Gillespie testified that James had mentioned specifically "union" in connection with the reasons for Respondent's dissatisfaction with McKinney: "He has been causing a lot of dissension in the union amongst the men out there in our shop." The others testified only that James had referred to McKinney as being the source of dissension and problems, without testifying that James had stated specifically that these matters arose in connection with union activities.²⁵

Of the five witnesses called by the General Counsel, three of them testified that James had announced that a decision had already been made to terminate McKinney.²⁶ Thus, Kloth testified that James had said "that Hugh McKinney was dismissed, he would no longer be with us, that he had been causing dissension among the employees, and he would be happier somewhere else, and that we will all be a lot better off without him out there." Similarly, Class C helper Valentin Garcia testified that James had said "that he was sorry to see a good mechanic, good man terminated but, he said, from the way he had been acting he had it coming to him." Davenport initially testified in a similar fashion: "But when we first went in there Ralph James had nothing but praise for Hugh McKinney, that he could do first-class work but he just wasn't happy here and that he probably would make somebody else a good first-class man, and that with him being gone our troubles in this shop would be over." However, as Davenport continued testifying about this meeting, it became manifest that notwithstanding the remarks that he had attributed initially to James, the employees had not been told that Respondent had made a decision to terminate McKinney. For, Davenport acknowledged that Respondent's officials, during the meeting, had "just said [McKinney] had been indefinitely suspended. . . . I know the question was asked, and they just said he was indefinitely suspended." That Respondent's officials had said only that McKinney had been suspended was confirmed by Farris, who testified that, while James had said that he felt that McKinney could do a better job for someone else, he had also said that the meeting had been convened "to say that Hugh McKinney has been indefinitely suspended." In a like vein Gillespie testified that at the start of the meeting, the employees had been told, "As you know, probably heard by now, that Hugh has been indefinitely suspended."

Following the meeting with the employees, the investigation of McKinney's actions was conducted by Fleming, Hoerner, and A. A. "Chub" Williams. Farris, Davenport, and Kloth, as well as Johnson and McKenzie, were interviewed regarding the events that had transpired. The three employees agreed that they had been

²⁴ McKinney testified that, in response to his question concerning the purpose of the meeting, McKenzie had said that it was to be about the events of Friday and that McKinney was "going to get it." McKenzie denied both that McKinney had inquired about the purpose for the meeting and that he (McKenzie) had said that the meeting was to cover the events of March 16. It is undisputed, however, that before leaving the shop area, McKinney had telephoned Johnson and that, during their conversation, Johnson had said that the meeting pertained to what had happened on Friday.

²⁵ As will be discussed in greater detail *infra*, McKinney had been at odds with his superiors for quite some time.

²⁶ As discussed in greater detail *infra*, following the events of the morning of March 19, Respondent conducted an investigation after which it reached the decision that McKinney should be terminated.

questioned concerning McKenzie's last instruction to McKinney on March 16. In addition, Kloth testified, "I told them that Hugh was hurting and he needed to go to the doctor, and I felt I had the authority to send him to the doctor, and I told him to go, and he went on to the doctor." Fleming agreed that Kloth had reported to the investigators "that he and Hugh had talked about whether it would be advisable for Hugh to go ahead and leave and that Arthur had advised him to go ahead and go."²⁷

On March 23, Fleming sent a letter to McKinney, inviting the latter to attend a meeting on Wednesday, March 28, "to review the facts and circumstances leading to your indefinite suspension and to give you the opportunity to furnish any other information or possibly mitigating circumstances which we should consider in deciding if a disciplinary penalty is justified in your case." The letter assured McKinney that he would be permitted to select "a fellow employee of your choosing to attend this meeting if you so desire." It was also pointed out in the letter that the meeting which Johnson wanted McKinney to attend on March 19 had been intended solely to advise the latter of his indefinite suspension, not "to conduct a disciplinary interview," but that "to avoid any dispute and to be abundantly fair, be assured that you will not be disciplined for your refusal to go to Mr. Johnson's office last Monday." However, the letter cautioned that any disciplinary action that was taken would be based upon "your other conduct at work on that particular Monday and previous Friday." Despite receiving the letter, McKinney chose not to attend the scheduled meeting because, during a conversation, Fleming had said that McKinney would not be permitted to bring a representative of the Union, in lieu of an employee, to the meeting.

By letter dated March 29, McKinney was notified of his termination. That letter stated, in pertinent part:

We find that on March 16, 1979, when informed in the afternoon by your Foreman, that you would have to work overtime to complete re-assembly of a pump needed over the weekend, you flatly refused adding in the presence of other employees that "It's none of your business what I do after four." The Foreman then repeated that you would have to work the overtime. At 4:00 p.m. you promptly left the Refinery. Your leaving the incompleting job was clearly contrary to Company "Working Policies" booklet, which provides at page 28:

Any refusal to report for overtime work must have sufficient reason *and be by mutual agreement of the employee and his supervisor.* [Emphasis supplied.]

It must be noted that any enterprise, whether it be a privately owned plant or a public agency, requires persons with authority and responsibility to keep

the enterprise running. To keep an enterprise running, supervisors' orders must be obeyed. If the employee involved believes an order he receives is improper, his recourse is to the established grievance and arbitration procedure (pages 22-23 of the "Working Policies" booklet) rather than [sic] the "self-help" of walking off the job.

Your previous work record has not been good. In December 1977, you were given a three day disciplinary furlough for neglecting your job duties and warned that your further misconduct would result in discharge.

After careful review, you are hereby discharged from further employment with Sun Petroleum Products Company, on the basis of your past record and your insubordination on Friday, March 16, 1979.

With regard to that portion of the letter referring to McKinney's previous work record, Fleming—who, along with Laird, Hoerner, and Johnson, had made the decision to discharge McKinney—testified that he and Attorney Hutchinson had reviewed McKinney's personnel file. According to Fleming, "I picked out the letters that were in there that indicated some previous contact between McKinney and his supervisors." During the hearing, Fleming identified several specific memos, from among the numerous ones contained in McKinney's personnel file, as being the ones that he had selected during the pre-discharge review of McKinney's file. One of these memos referred to a September 7, 1977, incident where McKinney had been counseled by James and Johnson regarding the need to improve his sick leave record and job attitude. In that memo, which had been authored by James, appears the statement:

This was my second attempt to talk to this employee and to this date I do not feel that I have accomplished anything. I still consider him a poor employee who is blessed with a very low pain threshold and unless he improves his sick leave and ability to do normal mechanical work in the next six months, I will be faced [sic] to ask that he either be given another job or dismissed.

In December 1977, McKinney was given a 3-day disciplinary layoff.²⁸ A memo identified by Fleming, bearing the date December 19, 1977, describes a 10 a.m. meeting with Laird at which McKinney had complained about the suspension and had asserted that James "was 'on his back,'" and that James was unable "to perform properly as a supervisor and to recognize good work habits." A second memo bearing that same date recites the contents of Laird's discussion with James concerning the 10 a.m.

²⁷ Although Respondent contends that the Class A mechanics do not possess authority to excuse employees from work, a position consistent with all parties' position that they are not supervisors within the meaning of Sec. 2(11) of the Act, it appears from the testimony of Kloth and the other employees that the Class A mechanics had been doing so in practice.

²⁸ Johnson testified that, while the event that had precipitated a meeting with McKinney regarding his work attitude had been the latter's conversing with another employee during worktime after having spent a significant portion of the workday doing no productive work, the suspension had been imposed because during that meeting McKinney had refused to accept the criticisms of his work that were discussed and, thus, he was suspended "to think about it and come back with an attitude that we could work with a little bit better."

meeting with McKinney. According to the memo, James had reported that, despite numerous counseling sessions with McKinney, James felt "that on no occasion was he successful in getting across to McKinney the necessity for improving his work performance to an acceptable level. He believes that McKinney's attitude is such that he does not accept criticism nor suggestion and that he refuses to consider the need for improvement." This memo also recites that Laird later met with Johnson, "who stated that he had attempted to talk with McKinney as [sic] a counseling session, but that McKinney refused to accept or to listen to Johnson's advice and was, in fact, arrogant to the point that he was infuriating. Johnson made the decision to administer disciplinary action in the form of three day [sic] without pay."

Also identified by Fleming were two memos dated December 20, 1977, one authored by Laird and the other by Hoerner. The latter's memo concerns a separate meeting with McKinney on the prior day regarding the suspension. It states that McKinney had "questioned the knowledge and integrity of his supervisor, Mr. Ralph James, in particular." It also recites that McKinney had complained "that he has been singled out and observed far more closely than anyone else. He was told at this time that perhaps this was true because everyone under probation are [sic] watched very closely." Laird's memo of December 20, 1977, describes his meeting with McKinney to discuss the results of Laird's investigation of the complaints made by McKinney on December 19, 1977. According to the memo, Laird had told McKinney that, on the basis of his own observations and of "personnel reports over a long period of time," he (Laird) had concluded "that McKinney has no real enthusiasm for continuing his employment here and shows little inclination to accept supervision and counseling in the proper spirit so as to maintain a good working relationship." The memo also recites that McKinney had "maintained throughout the meeting that he was being harassed and was constantly critical of Mr. James' abilities as a supervisor of his department. He was critical of all phases of Mr. James' supervision, including aspersions on his knowledge of the work to be done."

One other memo selected by Fleming bears the date February 21, 1978, and is from James to Johnson. In it, the latter describes a 3-hour counseling session on January 30, 1978, with McKinney. James states that McKinney "still doesn't think I am capable of judging his performance or his ability or his attitude. . . . His statement along the lines of others he had talked to in this company's management was that we had ganged up on him and were not listening to what he was saying but were only sticking together." According to the memo, "[W]e discussed his quitting and finding a job where the people he was accountable to were more to his liking." However, recites the memo, McKinney had retorted that he would not quit and that Respondent would have to fire him. The memo states that at one prior counseling session McKinney had asked why James did not fire him "and get it over with." In the memo, James stated that McKinney had rejected the suggestion that he transfer to another department, but that James felt "that if he is dis-

satisfied [sic] with his supervision he may possibly find one in another department he respected or liked better."

Turning to the final matter raised in this proceeding, the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by making copies of *subpoenae ad testificandum* served by the General Counsel upon employees and by telling those employees that the copies would be placed in their personnel files. That this did occur is not disputed. Respondent's counsel represented that prior to the hearing Respondent had made the determination, consistent with its general policy regarding payment of employees for time lost due to court appearances, to pay the employees for worktime lost by having to attend these proceedings. That such a general policy did exist was shown by the testimony of Kloth, Gillespie, and Davenport, each of whom testified that, when they had been called for jury duty, they had been obliged to submit their jury notices to Respondent after which they were paid for the worktime that they had lost by virtue of having to respond to those notices. That Respondent did pay the employees subpoenaed in this matter was shown by Kloth's testimony that he had been paid for worktime which he had lost by virtue of having to attend the first day of these proceedings. No employee testified that Respondent's officials had said anything to discourage him from attending these proceedings and, so far as the record discloses, no threatening or coercive statement was made to any of the employees regarding their attendance.

IV. ANALYSIS

The threshold question in this matter is whether Respondent committed unfair labor practices by suspending and by then discharging McKinney, and by copying the *subpoenae ad testificandum* and telling employees that the copies would be placed in their personnel files. For, if Respondent's actions in these respects were not unlawful, then there is no basis for having set aside the settlement agreement in Case 23-CA-7227, and it should be reinstated. See *Jake Schlagel, Jr., d/b/a Aurora and East Denver Trash Disposal*, 218 NLRB 1, 9 (1975).

The complaint in Cases 23-CA-7453 and 23-CA-7453-2 alleges that McKinney was suspended for refusing to attend a meeting with management because his request to be accompanied by a witness had been rejected. According to the General Counsel, McKinney had a right to be accompanied by a witness under the doctrine enunciated in *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). In that case, the Supreme Court sustained as being proper "[t]he Board's construction that creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline . . ." (420 U.S. at 256.)²⁹ However, the *Weingarten* right does not

²⁹ In view of my ultimate disposition of this matter, it is not necessary to reach the issues of McKinney's right to representation, under *Weingarten*, in light of the fact that he was not represented by a representative within the meaning of Section 9 of the Act and in light of the further fact that he had asked only for a witness. However, were it necessary to do so, I would conclude that the *Weingarten* doctrine does apply to requests for a witness and does exist even where there is no statutory bargaining representative. See *E. I. DuPont de Nemours and Company, Incorporated*, JD-(SF)-153-80 (May 19, 1980).

exist in every situation where an employee must meet with members of management. "[A]s long as the employer has reached a final, binding decision to impose certain discipline on the employee prior to the interview, based on facts and evidence obtained prior to the interview, no Section 7 right to union representation exists under *Weingarten* when the employer meets with the employee simply to inform him of, or impose, that previously determined discipline." *Baton Rouge Water Works Company*, 246 NLRB 964, 968 (1979). As set forth above, Johnson testified that at the March 19 meeting he had intended to do no more than to announce the decision to suspend McKinney and to present him with the letter typed by Pyles. Consequently, as described by Johnson, the meeting would have been confined to informing McKinney of the previously determined decision to suspend him indefinitely pending investigation of the events of March 16.

Focusing upon two facets of the evidence in this proceeding, the General Counsel argues that Johnson's testimony with regard to the purpose of the March 19 meeting should not be credited and that it cannot be found that there had been a determination to suspend McKinney prior to that meeting. First, on March 23, an interoffice correspondence memo was authored by Johnson, reciting the events of March 16 through 19. The first two paragraphs of that memo read:

On Friday, March 16, 1979, Hugh McKinney violated at least three (3) articles of the work policies (in my opinion). Enclosed is a letter outlining the violations.

It was decided on Monday, March 19, 1979, to suspend Hugh pending further investigation for these flagrant violations of work policy. The above referenced letter was written and typed over the weekend (March 17 & 18). [Emphasis supplied.]

The General Counsel argues that the italicized portion of the second paragraph shows that the decision had not been made until March 19, rather than on March 16, as Respondent contends. Second, the General Counsel points to the accounts of McKinney, Farris, and Davenport that Johnson had said, during the encounter on March 19, that McKinney was being suspended for not having attended the meeting in his office. This also shows, according to the General Counsel, that there had been no decision to suspend McKinney prior to the meeting and, accordingly, that the *Baton Rouge* limitation to the *Weingarten* doctrine was inapplicable to the March 19 meeting. I do not agree.

With regard to the March 23 memo, careful inspection shows that, due to imprecise phraseology, it is susceptible to more than a single interpretation. It could be read, as the General Counsel argues, to mean that the decision itself had been made on March 19. But, it also could be read to mean that a decision had been made that on Monday, March 19, McKinney would be suspended; that is, that the phrase "on Monday, March 19" pertains to "to suspend Hugh," rather than to "It was decided." That this second interpretation is the correct one is shown by the following sentence in which the weekend

preparation of the suspension letter is described. That letter clearly announces that McKinney was being suspended. Accordingly, a prior decision to that effect had to have been made prior to, at least, the evening of March 17, when Johnson contacted Pyles regarding preparation of the letter. In these circumstances, the ambiguous phraseology of the initial sentence of the second paragraph of Johnson's memo does not serve to refute Respondent's evidence that a final decision to suspend McKinney had been made prior to March 19.

Nor do the descriptions of McKinney, Farris, and Davenport as to what Johnson had said to McKinney during their exchange in the shop after leaving the office area. The witnesses' descriptions of that exchange show that all involved had become emotional. Many of the words spoken and actions taken were less than calm and rational. Consequently, it is unlikely that even the observers would have perceived the distinction between the departure from the refinery that would have resulted naturally, but not immediately, from McKinney's suspension, and the *immediate* departure that Johnson demanded of McKinney because of his, in Johnson's view, insubordinate conduct that morning. In other words, McKinney would be expected eventually to leave the refinery because of his suspension, but Johnson wanted him to do so immediately because of his insubordination. Johnson's own testimony shows that the circumstances had left him so overwrought that it is quite likely that he simply did not articulate the distinction clearly. Conversely, when testifying, the three employee witnesses, particularly McKinney, displayed a certain degree of hostility toward Respondent's position with the result that, even had Johnson articulated why he wanted McKinney to leave immediately, I would have reservations regarding whether they would have reported his words accurately. In this regard, I credit the testimony of Respondent's witnesses, particularly Pyles, concerning the sequence of events that led to preparation of the suspension letter. Consequently, whatever words were uttered on March 19 by the emotional Johnson do not serve to undermine Respondent's defense concerning the existence of a prior decision to suspend McKinney indefinitely.

In any event, even had McKinney been suspended for refusing to attend the March 19 meeting in Johnson's office, it would appear that the *Weingarten* doctrine would not be applicable. For, by first refusing to even leave the shop area to go to Johnson's office and by then refusing to go any further than Pyles's office, McKinney was, in effect, compelling Respondent to conduct its meeting in areas where other employees were present and working. "While an employee may make a request for union representation while on the plant floor, and need not repeat the request at the office if the official there is aware of such request, he may not refuse to report to the office as directed." *Roadway Express, Inc.*, 246 NLRB 1127, 1128 (1979). Therefore, I find that Respondent's conduct and McKinney's suspension on March 19 did not violate Section 8(a)(1) of the Act under the *Weingarten* doctrine.

As an alternative theory regarding the suspension and as the basis for alleging that McKinney's discharge had

been unlawful, the General Counsel argues that Respondent had seized upon the events of March 16 and 19 as a vehicle for ridding itself of McKinney because of his activity on behalf of the Union. It is not, of course, a novel proposition that an employer violates the Act if it watchfully waits for an employee to commit a transgression and then uses that transgression as a means for terminating that employee, in reality, because of his or her support for and activities on behalf of a labor organization. See, e.g., *N.L.R.B. v. Lipman Brothers, Inc., et al.*, 355 F.2d 15, 21 (1st Cir. 1966). On the other hand, support for and activity on behalf of a union do not immunize employees from the obligation to observe company directions, nor do they preclude employers from implementing disciplinary procedures when employees fail to observe those directions. See, e.g., *Butler-Johnson Corporation v. N.L.R.B.*, 608 F.2d 1303 (9th Cir. 1979).

Here, the credible evidence shows that McKinney had a history of belligerence toward supervision, that he had been directed specifically to work overtime on March 16, that he had disregarded that direction, that Respondent had investigated the incident by interviewing all employees and supervisors who had witnessed it and by attempting to secure McKinney's version of what had occurred, and that based upon the nature of the offense, viewed in light of McKinney's prior attitude toward supervision, Respondent had decided to discharge McKinney for leaving early on March 16. While the General Counsel advances several arguments, many of which have apparent facial merit, in opposition to this conclusion, careful analysis of each of these arguments, in light of the evidence presented, shows that they do not serve to show that Respondent had been motivated by unlawful considerations in arriving at its decision to terminate McKinney.

First, the General Counsel argues that McKinney had been the principal union activist at the refinery and that the campaign to organize employees had continued into 1979. Of course, both of these assertions are accurate. Nevertheless, this activity would not appear to have been of the concern to Respondent that the General Counsel seeks to portray. So far as the record discloses, no new petitions for election were filed nor demands for recognition made following dismissal of the petitions filed in April 1978.³⁰ Thus, so far as the record discloses, there is no basis for inferring that Respondent would likely have viewed the joint organizing campaign as being of any consequence. Further, although McKinney had been the most active of the Union's proponents during the first part of 1978, there is no evidence that he had continued to be as active following approval of the settlement agreement in September 1978.

Second, the General Counsel points to the animus displayed by the statements that became the subject of the settlement agreement approved in September 1978. Yet, there is no evidence that Respondent had engaged in additional unlawful conduct between September 29, 1978, when the agreement had been approved, and March 16,

when McKinney had departed from the refinery in defiance of McKenzie's express order not to do so. So far as the record discloses, Respondent honored the promises which it made in that agreement. Moreover, aside from the meeting involving McKinney and Davenport following the representation hearing, all of the unlawful statements covered by the settlement agreement had been attributed to James. James, of course, had been involved in the incidents leading to McKinney's termination only as a witness and not as either a direct participant or as one of the officials who had made the decisions to suspend and to discharge McKinney. Indeed, there is some doubt that Respondent shared James' view toward unionization, in general, and toward the Union, in particular. For, the Union does represent other employees employed by Respondent and there is not even a contention, much less evidence, that any animosity had existed between Respondent and the Union in their dealings regarding those employees.

Third, it is argued that McKinney's difficulties with Respondent commenced, for the most part, after he had initiated campaigning for representation by, first, OCAW, and, later, by the Union. This argument, however, is refuted by the evidence. Even before September 1977, McKinney had been counseled regarding his attendance record and, during that month, concern had been expressed concerning the validity of his sickness excuses.³¹ In December of that same year, McKinney was given a 3-day disciplinary layoff. At that time, Respondent's officials complained about his disregard of instructions designed to improve his performance.

When he testified, McKinney claimed that he had commenced organizing activity for OCAW in December 1977, thereby creating some doubt concerning whether the disciplinary layoff and comments about his work, made during that month, had been unrelated to his initiation of protected activity. However, none of the other employees called as witnesses by the General Counsel corroborated McKinney's assertion that organizing activity had begun in 1977; to the contrary, each of them testified that it had commenced in 1978. Further, although Diegel was called as a witness by the General Counsel, in part, to corroborate McKinney's testimony pertaining to the time at which the Union's campaign had begun, no official of OCAW was called to provide similar corroboration for McKinney's assertion that he had initiated activity on behalf of that labor organization in December 1977. In light of these circumstances and in view of my observation, noted above, that McKinney appeared to be hostile toward Respondent and, indeed, appeared to be attempting to tailor his testimony to enhance his position in this proceeding, I do not credit McKinney's assertion that organizing activity had been commenced by him in

³⁰ Since no election was conducted as a result of the two petitions filed in April 1978, there would have been no bar under Sec. 9(c)(3) of the Act to OCAW and the Union seeking an election by filing another petition following dismissal of the petitions in June 1978.

³¹ Although McKinney testified that he had not seen all of the memos in his personnel file, he did not, in the final analysis, dispute the substance of those memos. Lest there be any question, the contents of those memos are admissible as substantive evidence under Fed. R. Evid. 803(6). Further, in any event, in light of the corroborative testimony and other evidence in this matter, their contents may be relied upon as substantive evidence even if they are hearsay. "The Board jealously guards its discretion to rely on hearsay testimony in the proper circumstances." *RJR Communications, Inc.*, 248 NLRB 920, 923 (1980).

1977. Instead, I find that he was attempting to advance the date of commencement of the organizing campaign in an effort to diminish the adverse effect of his layoff and the surrounding criticisms of his work.

Not only do the memos show Respondent's dissatisfaction with McKinney's performance prior to commencement of organizing activity, but they also disclose that an acrimonious relationship between McKinney and James had existed for some time prior to the former's attempt to obtain representation. For example, in December 1977, McKinney had complained that James "was 'on his back'" and had told Laird that, in effect, James was incompetent. Farris related that conflict between McKinney and James had continued over a 2- or 3-year period and Davenport testified that it could have begun as early as 1975. In short, the hostility between James and McKinney did not arise when the latter had initiated his campaign for representation. Moreover, this background serves to nullify whatever possibility that two added factors, pointed to by the General Counsel, might have as indicia of Respondent's unlawful motivation in suspending and then terminating McKinney. McKinney claimed that, on several occasions, James had said that "he had my file stacked. He had it fixed to where I couldn't get a job in this area." However, there is no evidence that James had begun to make these comments only after McKinney had initiated his organizing activities. Moreover, the comments themselves do not, by their terms, relate to McKinney's organizing activity. In short, it simply cannot be said that they were based upon other than the preexisting hostility that had developed between James and McKinney.

The other factor to which the General Counsel points, as an indication of Respondent's unlawful intent, is the remarks made by James on March 19, after McKinney had departed from the refinery. At the outset, I do not credit Gillespie's testimony that James had specifically attributed McKinney's suspension to "union," nor do I credit Kloth's and Garcia's accounts to the extent that they claimed that James had said that McKinney had been terminated. Both Farris and Gillespie testified that James had said "suspended." As Davenport's testimony showed, in listening to, recalling, and narrating James' words, the employees were not always careful to delineate between suspension and discharge. If Respondent had already decided to terminate McKinney by the time of the meeting, it seems unlikely that it would have then gone to the trouble of conducting an investigation, as it did do. Conversely, if it had conducted the investigation as part of a ruse to conceal having already made a decision, it seems improbable that James would have completely undermined that plan by making a public admission to the contrary. Similarly, in the circumstances, it seems unlikely that Respondent would have announced publicly that union considerations had influenced its decision if that had been the fact. I have no doubt that the employees *believed* that McKinney's union activities had influenced Respondent's decisions concerning him. Yet, there was no corroboration for Gillespie's testimony that James had said so specifically and it appeared in this respect that Gillespie's belief had been the mother to his recollection of what James had said.

This, then, leaves for consideration the comments that James had actually made to the employees on March 19. He said that McKinney was a good or "first-class" worker. But, that is not inconsistent with Respondent's defense. At no point did Respondent challenge McKinney's proficiency. Rather, its complaints, as the memos recite, pertained to his attitude and willingness to exercise his work skills. James also said that McKinney had caused dissension among the employees and trouble for Respondent. In some circumstances the terms "dissension" and "trouble" have been found to have been synonymous with union activity. However, the events of that very morning, when McKinney had, in Respondent's view, disrupted operations in the shop area and had drawn Davenport and Farris into his argument with Johnson, had caused problems involving other employees working at the refinery. Further, as McKinney's and James' history of acrimonious relations shows, James had felt that McKinney's conduct had caused problems, unrelated to the Union, for supervision. Consequently, there is an alternative, equally plausible, interpretation of James' remarks that does not involve conduct protected by the Act. James also said that McKinney would be better off elsewhere and that Respondent would be better off without him. Yet, this remark was no more than a repetition of the opinion that James had expressed during his meeting with McKinney in February 1978, when he had suggested that McKinney secure "a job where the people he was accountable to were more to his liking." In sum, the General Counsel's quarrel with the remarks made by James to the employees appears directed more to the fact that he had failed to do as good a job as could have been done in explaining McKinney's suspension. Armed with the benefit of hindsight, James might well agree that his presentation had not been one that had been ideal. Be that as it may, his remarks were not inconsistent with Respondent's defense and they do not provide evidence that Respondent's decision to suspend and then to terminate McKinney had been motivated by unlawful considerations.

Fourth, McKinney claimed that Respondent's policy concerning overtime "until that Friday, had always been voluntary. If you had something to do, you know, like if I wanted to go somewhere like that, you could get somebody to work for you or they would ask around and find somebody to take your place." The crucial point here, however, is the ability to get someone else to serve as a replacement. For, as Davenport ultimately conceded, if a replacement could not be located, then the employee seeking to leave could not do so and had to work the overtime. Yet, it is undisputed that when McKinney initially had been directed to work overtime on March 16, he had merely replied that he could not do so, because of a doctor's appointment, and had left it to McKenzie to locate a replacement in the hour remaining before 4 p.m. on that Friday.

Nevertheless, McKenzie expressed willingness to permit McKinney to leave, so long as a comparably rated replacement could be located. But, when McKenzie then sought McKinney's aid in facilitating scheduling, by extending Respondent the undisputedly normal cour-

tesy of providing earlier notification on those days when he had to leave at 4 p.m., McKinney implicitly rejected this request by abruptly saying, at least, that what he did after normal hours was personal. It was at this point that McKenzie, as Kloth described it, "turned red" and withdrew permission for McKinney to leave at 4 p.m. Consequently, this is not a situation where it can be said that Respondent treated McKinney differently for any reason other than the latter's own recalcitrant and intemperate reaction to a reasonable request which, by the way, has not been alleged as having been the product of unlawful considerations. Even, therefore, though Respondent did not normally require employees to work overtime, there is no basis for concluding that the exception here had been occasioned by any reason other than a reaction to another instance of McKinney's longstanding disdainful attitude toward supervision.

Fifth, the General Counsel points out that, after McKenzie had left, Kloth had agreed to McKinney's departure and while this had ultimately been brought to Respondent's attention before it had made the decision to terminate McKinney, it still had chosen to discharge McKinney and had not disciplined Kloth. It is undisputed that Kloth has not been, at any time material herein, a supervisor within the meaning of Section 2(11) of the Act. Whether he ordinarily possessed authority to excuse employees for illness, he did not possess authority to overrule McKenzie's decisions, nor did McKinney testify that he had believed that Kloth had possessed authority to overrule decisions made by McKenzie. Further, McKinney knew that Kloth had been present on March 16 when McKenzie had forbidden McKinney's departure at 4 p.m. In these circumstances, McKinney can hardly rely upon what he had been told by Kloth as an excuse for his departure that day in defiance of McKenzie's express instructions not to do so. The decision had been his own and had been made with full appreciation that he was violating McKenzie's directions.

That Kloth did not possess authority to overrule decisions made by McKenzie was as apparent to the officials who had conducted the investigation as it must have been to McKinney. Accordingly, the fact that they had been aware of Kloth's agreement to McKinney's departure at 4 p.m. on March 16 hardly serves to absolve McKinney of responsibility for having left at that time. Regardless of what he had been told by fellow employee Kloth, in leaving that day McKinney had directly disobeyed an order given to him by one higher in authority than Kloth. Consequently, it is not indicative of an unlawful motive that Respondent decided to discharge McKinney even though it had been aware, at the time that it had made that decision, of the exchange between Kloth and McKinney on March 16.

No explanation was advanced by Respondent for not disciplining Kloth, as well as McKinney for having, in effect, counseled McKinney to disobey McKenzie's order. However, contrary to the General Counsel's argument, this does not suffice to show that Respondent's motivation had been impure. As noted above, regardless of Kloth's attitude toward the matter, it had been McKinney who had made the decision to leave and it had been McKinney who had disobeyed McKenzie in

deciding to do so. Kloth had not been the employee to perform insubordinately, regardless of his attitude toward the matter. Of course, had Kloth opposed unionization of Respondent's employees, the failure to discipline him might be argued as showing some differentiation between union proponents and opponents. However, that was not the fact. Not only had Kloth supported the Union, but he had been active in its organizing campaign. Thus, there is no basis for concluding that Respondent's actions showed that it had treated union supporters differently from union opponents, even assuming, *arguendo*, that Kloth's March 16 conduct could be equated with that of McKinney.

Two final factors are pointed to by the General Counsel as asserted indicia of Respondent's discriminatory intent. It is argued that Respondent's object of lying in wait for McKinney to commit an infraction, in order to dispose of him because of his support for the Union, is shown by the fact that Johnson, Hoerner, and Fleming had waited together until 4 p.m. to ascertain whether McKinney would disobey McKenzie's order not to leave at that time. Yet, Respondent's officials credibly testified that the situation posed by McKinney's announcement that he did not intend to obey McKenzie had been a novel one. They further testified credibly that they had wanted to assess Respondent's position should McKinney leave. In short, their purpose had been to avoid acting arbitrarily. Certainly, that is not an indication of unlawful intention.

Next the General Counsel argues that the scope of the post-suspension investigation shows Respondent's discriminatory intent because it had been confined to ascertaining whether McKenzie's last instruction to McKinney on March 16 had been to remain after 4 p.m. and whether McKinney had left. However, those are the very two factors that Respondent contends had precipitated its decision to discharge McKinney. Surely, therefore, the fact that they had been the focal point of the investigation hardly shows that Respondent acted inconsistently with its reason for terminating McKinney.

In the final analysis, a preponderance of the evidence simply will not support the conclusion that Respondent had acted upon an unlawful motive in deciding to suspend and to later discharge McKinney. Respondent had been dissatisfied with McKinney's attitude and with his hostility toward supervision before any organizational activity was initiated. As the memos in McKinney's personnel file show, particular concern existed regarding McKinney's "very low pain threshold." On March 16, when told of the need for overtime work, McKinney suddenly said that he could not work overtime because of an appointment with a doctor who Fleming, at least, knew had followed a practice of not accepting appointments. Although McKinney claimed to have been in severe pain all day on March 16, he had continued working that day until the normal quitting time, without reporting his pain to Respondent's officials, without seeking time off to leave earlier in the day to secure alleviation of that pain, and without even seeking assistance from the nurse stationed at the refinery. In spite of these factors, McKenzie said that he would allow McKinney

to leave at 4 p.m., providing a replacement worker could be located. But, when McKinney then disdainfully rejected the reasonable request that he aid in scheduling by reporting his commitments, at least, earlier in the day when he had commitments, McKenzie became angered and withdrew the permission granted previously. In so reacting, McKenzie might have acted imprudently, but these facts do not show that his conduct had resulted from considerations unlawful under the Act. When McKinney then left the refinery at 4 p.m., Respondent could have terminated him for insubordination, but did not do so. Instead, it suspended him and conducted an investigation in an effort to be certain of the accuracy of its supervisors' report as to what had occurred. When it determined that McKinney had been instructed to remain, but had disregarded that instruction, Respondent made the decision, in light of McKinney's longstanding disdainful attitude toward supervision, to terminate him. Again, these facts do not demonstrate an unlawful motivation. Therefore, I find that a preponderance of the evidence does not establish that McKinney had been either suspended or discharged for considerations unlawful under the Act.

Finally, it is alleged that Respondent violated Section 8(a)(1) of the Act by making duplicates of subpoenas served upon its employees by the General Counsel and by telling those employees that the duplicates were to be placed in their personnel files. It is undisputed that Respondent did these things. However, it also is undisputed that Respondent normally pays its employees for work-time lost due to appearances at court proceedings. Kloth testified that he had been paid for attending the first day of the hearing in this matter. There is no contention that the other subpoenaed employees, who had reported to the hearing on that day, had not also been paid, even though they had not worked at the refinery. Accordingly, Respondent acted consistently with its payment policy with regard to the employees subpoenaed by the General Counsel.

Each employee who described prior instances of having to appear for jury duty, during worktime, testified that he had submitted his jury notice to Respondent. Thus, submission of, in effect, proof of appearance at a legal proceeding was not novel for Respondent's employees. Finally, as was apparent when McKinney's personnel file was produced and reviewed, Respondent maintains detailed records in its personnel files. There has been no showing that inclusion in personnel files of documents submitted as proof of appearance at a legal proceeding is viewed by employees as being extraordinary. To the contrary, Davenport testified that the jury notices that he had submitted to Respondent were "[p]robably put in my file, I guess."

To equate Respondent's procedure regarding the subpoena with employer requests for copies of affidavits given by employees during a Board investigation, as does the General Counsel, is not appropriate. There is no valid purpose for an employer to request a copy of an

affidavit given by an employee during an investigation. By contrast, here the employees were seeking to be paid for time when they would not be working. Respondent certainly is entitled to verify whether their absences would be occasioned by a circumstance for which it was willing to pay. The General Counsel argues that there was no need for Respondent to copy the subpoenas, nor to place those duplicates in the employees' file. Yet, this has not been shown to have been inconsistent with Respondent's handling of prior situations where employees had presented jury notices as proof that they had not been able to work because they had been obliged to appear in a legal proceeding. It is Respondent's practice to maintain detailed records and it is not the function of the trier of fact to substitute his or her subjective impression of business procedures for that of employers. See, e.g., *Grand Auto, Inc., d/b/a Super Tire Stores*, 236 NLRB 877 (1978). Therefore, I find that Respondent did not violate Section 8(a)(1) of the Act by mechanically reproducing subpoenas served upon its employees and by saying that the duplicates would be placed in the employees' personnel files.

In view of the foregoing findings, I grant Respondent's motion to dismiss the complaints and to reinstate the settlement agreement in Case 23-CA-7227, inasmuch as Respondent committed no subsequent unfair labor practice warranting the setting aside of that settlement agreement.

CONCLUSIONS OF LAW

1. Sun Petroleum Products Company, a Division of Sun Oil Company of Pennsylvania, is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local Union No. 278, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not violated the Act in any manner after September 29, 1978, and there was no basis for setting aside the settlement agreement approved on that date in Case 23-CA-7227.

Based upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER ³²

It is hereby ordered that the complaints be, and they hereby are, dismissed in their entirety and that the settlement agreement in Case 23-CA-7227 be reinstated.

³² In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.